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(1)

09-55 - 2009

No.

IN THE

Supreme Court of the United States

NANCY MATHIAS ADAIR

Petitioner

v.

MCGUIREWOODS LLP
AND JOSEPH TIRONE

Respondents

On Petition for Writ of Certiorari
to the United Stated Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the provisions of the Family and Medical Leave Act of 1993 (FMLA) are mandatory or optional?

Whether the admission by an employer of failure to provide to an employee the notice required under Section 825.301[1] is enforceable and, if so, by what remedy?

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[1] The Code of Federal Regulations. Volume 29. Part 825. contains the FMLA regulations from the United States Department of Labor. Employment Standards Administration.

PARTIES TO PROCEEDINGS

No. 08-1078

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nancy Mathias Adair
v.
McguireWoods LLP and Joseph G. Tirone

Complaint by Employee
against Employer and Supervisor
for
FMLA Interference,
FMLA Retaliatory Termination,
Defamation, and
Intentional Infliction of Emotional Distress

Appeal from Summary Judgment
and Jury Verdict in
UNITED STATED DISTRICT COURT FOR
DISTRICT OF MARYLAND
1:06-CV-02602-MJG

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nancy Mathias Adair respectfully requests that a writ of certiorari be granted and that summary reversal of the judgment of the appeal court be entered and the case be remanded to the trial court for determination of enforcement remedies consistent with the reversal.

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit was entered on August 6, 2009. It is included in the Appendix to this petition.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on August 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Family and Medical Leave Act of 1993 (FMLA) appears in Title 29 of the United States Code, Section 2601 et seq.

The Code of Federal Regulations, Volume 29, Part 825, contains the FMLA regulations from the United States Department of Labor, Employment Standards Administration.

See links and forms at http://www.dol.gov/esa/whd/fmla/index.htm.

See Appendix for pertinent text.

STATEMENT OF THE CASE

Plaintiff Adair was employed as a legal secretary at the Defendant Law Firm for eight years, during which time she had annual performance reviews and received annual salary increases, the last of which was in April 2005 in the amount of $1,500. In the summer of 2005, employee was on vacation in Canada when she got word that her mother had suffered a heart attack, open heart coronary artery bypass graft (CABG) surgery, and a stroke while in California to attend a wedding. Employee returned to Maryland and informed her employer that she planned to return to work early from vacation in order to save her leave time to help care for her mother upon her return to Maryland.

At the trial of this case in November 2007, the defendant law firm stipulated that the employee and the employer both qualified under the FMLA, and that the employee's mother suffered a "serious medical condition."

It was further undisputed that the employee had notified the employer of this "FMLA-qualifying situation" and had requested leave to help care for her mother, and that the employer did not give the employee the required notice of employee's rights under the FMLA. Because no FMLA-required forms or notices were given to the employee, the ripple effect of this failure allowed the subsequent interference and termination to occur.

Notice must be confirmed by the employer **in writing within two days** of receipt of information indicating an FMLA-qualifying condition or event.[2]

One of the attorneys to whom employee was assigned objected to the employee's leave in an email to the office manager in August 2005. He made it clear that he did not want the employee to leave early without his express permission and that he did not plan to approve any such requests. In a further email to the office manager in August 2005, the objecting attorney requested that the employee be removed and a replacement be hired. The employee's employment with the law firm was terminated on September 1, 2005.[3]

The failure of the employer to give the employee the required notice was in violation of the FMLA, and the attorney should have been informed by the employer that an employee has an absolute right to request leave to help care for a parent with a serious medical condition. If this had been done, the employee would have been allowed to take the requested leave, and no termination would have occurred.

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[2] Forms are available from the United States Department of Labor. See Notice: Employer Response to Employee Request for Family and Medical Leave Form WH-381.

[3] During the same week in 2005, Hurricane Katrina hit the United States on August 29, and Chief Justice Rehnquist died on September 3. Justice Rehnquist wrote the opinion in *Nevada v. Hibbs*, which upheld the authority of Congress to pass the Family and Medical Leave Act of 1993.

The FMLA gives the employee a "job-protected" status and therefore the termination of the employee was in violation of the FMLA.

The question then becomes whether compliance with and enforcement of the provisions of the FMLA are mandatory or optional for the employer? Surely, the answer is that the FMLA is mandatory and the employer does not have the option to ignore the FMLA.

Why the employer did not know all of this is unclear to the employee. It may be that it is because most if not all of the experience of the Baltimore office manager was with requests for FMLA leave that involved employees who were themselves the ones with the serious health condition that required leave or requests for leave that were to be unpaid (where the employees had already used all of their paid leave) and thus involved notifying the payroll department in Richmond, where human resources personnel there would have known to send out the required forms. Whether the failure to follow the FMLA in plaintiff's case was due to ignorance of the provisions of the law dealing with paid intermittent leave or due to simple neglect to send the required notices is unclear, but it is not relevant if the law is mandatory, not optional, and must therefore be complied with in all cases. If the FMLA does not have to be followed in plaintiff's case that would indicate that it is optional, rather than mandatory, and surely that is not true.

With the stipulations of the defendant employer and the undisputed facts of the requests for leave that led to the termination, the employer should have

been found to have violated the FMLA if the FMLA is mandatory. Only if the FMLA is optional, can the employer be permitted to violate it without the employee receiving the remedies set forth in the FMLA.

If review of a judgment of a US court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

Plaintiff filed the case in August 2006 in state court in the Circuit Court of Maryland for Baltimore City. Defendants' attorneys moved the case to federal court in the United States District Court for the District of Maryland, in Baltimore, where the case went to trial in November 2007. Plaintiff-Appellant filed notice of appeal of the district court's decision to the United States Court of Appeals for the Fourth Circuit in December 2007.

REASONS FOR GRANTING THE WRIT

Important considerations for accepting a case for review include the importance to the public of the issue. The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace.

There are few cases and opinions available that deal with FMLA law. The likely reason for this is that most employees are unable to afford the significant cost of filing and pursing a claim against an employer. The issues in this case are however important to the vast majority of employees and employers who will find themselves in an FMLA-qualifying situation.

It is hoped that the court stating that compliance with the FMLA and all of it provisions is mandatory. not optional, will serve to help educate employers and by extension also help future employees who ask for intermittent leave to care for a family member with a serious health condition to be heard and understood to be describing an FMLA-qualifying event, and the employer will send them the required notices so the employees will know their rights and protections and can state them if anyone tries to interfere with these rights and that, with this new shared knowledge, confusion will be less likely to lead to termination because the employee and the employer will both be more likely to have the knowledge necessary to understand that the employee's job is protected under the FMLA law.

After my termination on September 1, 2005. I was diagnosed with breast cancer. The occurrence of these events caused me to examine my mortality and the legacy that I would leave. Although I had been told that employees never win in federal court against employers, I was determined to pursue this case for all of the employees who live from paycheck to paycheck and do not have the resources to investigate the FMLA and realize what a valuable tool it is for employees and employers. My research found that the FMLA is both intended and expected to benefit employers as well as their employees.

Since my case was such a clear case of failure to give required notice, followed by interference and termination, I thought it would be an easy case to win, and the success of that case could be used to better educate and inform all employees and employers about the important rights and responsibilities of the FMLA.

When that did not happen, I made the decision to appeal still hoping that justice delayed would not be justice denied, and a written and published opinion would at least be on the books to help other employees and employers. The appellate court affirmed by unpublished per curiam opinion.

Some days I think that the universe has been conspiring for me to be right here right now, and if that is true for me it may be true for all of us and we all get to choose what part we will play in this ongoing adventure of life. I was forced to examine mine in a sudden and unexpected way that I would

not have chosen for myself, but that does not mean that there are no challenges to be pursued and no lessons to be learned – for me, for my employer, for all of the lawyers and witnesses and judges and courts who are touched by this case – and the decision whether the FMLA will be used as a tool to educate and inform is still in many hands.

I am taking this next step because it is all I know to do. The jury may have said no because they were not allowed to get all of the information. I cannot miss this opportunity because I was not persistent enough. I believe God works in mysterious ways and perhaps my filing this writ is still part of the plan.

The next step is in your hands and in the power that you hold to make a difference in my life and in the other lives of all of the employees and employers that will be touched by situations involving the FMLA in the future.

Thank you for your consideration of this writ of certiorari.

CONCLUSION

I respectfully request that the petition for a writ of certiorari be granted and the decision of the lower court be reversed, with summary reversal of the judgment of the court of appeals to be entered and the case remanded to the trial court for determination of enforcement remedies consistent with the reversal.

Respectfully submitted,

s/

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November 3, 2009

APPENDIX

The Family and Medical Leave Act of 1993 (FMLA) appears in Title 29 of the United States Code, Section 2601 et seq.

The Code of Federal Regulations, Volume 29, Part 825, contains the FMLA regulations from the United States Department of Labor, Employment Standards Administration.

See links and forms at http://www.dol.gov/esa/whd/fmla/index.htm.

Pertinent provisions:

FMLA allows eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has eared or accrued it. See §825.100(a)

FMLA promotes the welfare of the family by allowing the employee to care for a loved one without loss of a job or its benefits and entitlements.

Rights recognized by the FMLA are: (1) the employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition, for a new child, or to care for an illness in the family; (2) the right to take such leave on an intermittent basis, or on a reduced work schedule when medically necessary; (3) the right to reinstatement following such leave; and (4) the employee's right not to be discriminated or retaliated

against (including termination) for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the FLA.

An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. See §825.302-3.

When requesting leave under the FMLA, the employee need not mention the FMLA. In fact, the employee can be completely ignorant of the benefits conferred by the FMLA. It is sufficient notice if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. Employees need not complete any form to trigger application of the FMLA.

Because the requirements upon the employee are meager, each employer must teach supervisory staff to recognize the instances in which the FMLA might apply to an employee's request for leave. The question of FMLA designation requires the involvement of trained Human Resources professionals. Error should be in the direction of tentatively designating the condition as FMLA-qualified. The employer should act promptly and investigate further when needed.

The employer's duties and liabilities commence when a supervisor has knowledge, so the supervisors must be trained to recognized FMLA-qualifying events.

Notice must be confirmed by the employer **in writing** within **two days** of receipt of information indicating a qualifying condition or event.

Forms are available from the United States Department of Labor. See Notice: Employer Response to Employee Request for Family and Medical Leave Form WH-381.

§825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.
(2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b),

and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see §825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see §825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see §825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see §825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see §825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be

denied following FMLA leave, explaining the conditions required for such denial (see §825.218):
(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§825.214 and 825.604); and,
(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see §825.213).
(2) The specific notice may include other information—e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.
A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.
(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.
(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of

receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See §825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.
[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

The Family and Medical Leave Act of 1993 (FMLA) appears in Title 29 of the United States Code. Section 2601 et seq.

SEC. 2615. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.--
(1) EXERCISE OF RIGHTS.--It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.
(2) DISCRIMINATION.--It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

SEC. 2617. ENFORCEMENT.

(a) CIVIL ACTION BY EMPLOYEES.--
(1) LIABILITY.--Any employer who violates section 105 shall be liable to any eligible employee affected--
(A) for damages equal to--
(i) the amount of--
(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 proves to the satisfaction of the court that the act or omission which violated section 105 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) RIGHT OF ACTION.--An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) FEES AND COSTS.--The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1078

NANCY MATHIAS ADAIR,

Plaintiff – Appellant,

v.

MCGUIREWOODS LLP; JOSEPH TIRONE,

Defendants – Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:06-CV-02602-MJG)

Submitted: July 29, 2009 Decided: August 6, 2009

Before WILKINSON, MICHAEL, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Nancy Mathias Adair, Appellant Pro Se.
William W. Carrier, III, Jaime W. Luse, Tydings & Rosenberg, LLP, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Nancy Mathias Adair appeals from the district court's judgment after a jury trial dismissing all claims against McGuireWoods, LLP ("McGuireWoods"). Adair claimed McGuireWoods interfered with her rights under the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2006) ("FMLA") AND RETALIATED AGAINST HER FOR ASSERTING HER ENTITLEMENT TO LEAVE UNDER THE Act. She also asserted state law claims of defamation and intentional infliction of emotional distress. We affirm.

When reviewing the evidence at trial, this court must determine whether there was sufficient evidence to support the jury verdict. The evidence must be viewed in the light most favorable to the prevailing party and all reasonable inferences must be drawn in the party's favor. The court must not weigh the evidence or assess the credibility of witnesses. Baynard v. Malone, 268 F.3d 228, 234-35 (4th Cir. 2001); Herold v. Hajoca Corp., 864 F. 2d 317, 319 (4th Cir. 1988). We find evidence supports the jury's findings that McGuireWoods did not interfere with Adair's right to seek leave under the FMLA, nor was she terminated in retaliation for having sought protection under the FMLA.

With respect to the trial issues raised by Adair on appeal, we find no reversible error with the district court's evidentiary decisions, the manner in which the trial was to proceed or with the jury. The court did not abuse its discretion by granting in part McGuireWoods' motion in limine. See Buckley v.

Mukasey, 538 F.3d 306, 317 (4th Cir. 2008) (stating standard of review). We further find no reversible error with respect to evidence about one of the Defendants being injured on September 11, 2001. Because Adair cannot show prejudice, it was also not reversible error to inquire as to whether Adair's brother could afford to cover the costs of providing care for their mother.

While we review decisions made on summary judgment de novo, we find no reversible error with respect to the district court's decision to drop one of the Defendants or to grant summary judgment to McGuireWoods on Adair's defamation and intentional infliction of emotional distress claims.

As for the remaining issues raised by Adair, we find no merit. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED